

STATE OF INDIANA



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FILED

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INDIANA UTILITY
REGULATORY COMMISSION

CAUSE NO. 42726

PETITION OF THE BOARD OF DIRECTORS FOR)
UTILITIES OF THE DEPARTMENT OF PUBLIC)
UTILITIES OF THE CITY OF INDIANAPOLIS, AS)
SUCCESSOR TRUSTEE OF A PUBLIC)
CHARITABLE TRUST, FOR APPROVAL OF (1))
CERTAIN SERVICE LEVEL AGREEMENTS)
PURSUANT TO WHICH IT WILL PROVIDE A)
SUPPLY OF GAS TO STEAM PRODUCTION AND)
ELECTRIC GENERATION FACILITIES IT)
OPERATES UNDER THE NAME "CITIZENS)
THERMAL ENERGY;" AND (2) A MODIFICATION)
TO PETITIONER'S FUEL ADJUSTMENT COST)
FACTOR FOR STEAM SERVICE IN ORDER TO)
REFLECT PRICING AND OTHER TERMS OF THE)
APPROVED SERVICE LEVEL AGREEMENTS)

You are hereby notified that on this date a Presiding Officer in this Cause makes the following Entry:

On January 27, 2005, an intervening party in this Cause, the Citizens Industrial Group ("Intervenor"), filed *Citizens Industrial Group's Motion for Summary Judgment and Designation of Evidence* ("Motion"). On February 7, 2005, Petitioner Board of Directors for Utilities of the Department of Public Utilities of the City of Indianapolis, as successor trustee of a public charitable trust, d/b/a Citizens Gas & Coke Utility and Citizens Thermal Energy ("Petitioner") filed its *Designation of Evidence and Material Issues of Fact Precluding Entry of Summary Judgment* ("Response"). On February 14, 2005, Intervenor filed *Citizens Industrial Group's Reply Brief in Support of Its Summary Judgment Motion* ("Reply").

The evidence designated by Intervenor in support of its Motion is the prefiled direct testimony and exhibits of Craig A. Jones. Mr. Jones' direct testimony and exhibits were prefiled on behalf of Petitioner in anticipation of a scheduled evidentiary hearing.

Intervenor contends that this designated evidence demonstrates that Petitioner is not entitled to the relief it seeks in the form of Commission approval of the Service Level Agreements between Citizens Thermal Energy and Citizens' manufacturing and gas divisions for the provision of coke oven gas. Intervenor contends that the terms for the base price of coke oven gas and any adjustments thereto are governed by a 1996 Gas

Purchase Agreement between Petitioner and Indianapolis Power & Light Company ("IPL"). The price of coke oven gas in Petitioner's Service Level Agreements is greater than the price found in the Gas Purchase Agreement. Intervenor also argues that Petitioner's avoided cost methodology for pricing coke oven gas in the Service Level Agreements is unlawful as a hypothetical price structure and has no relationship to the actual fuel cost demonstration that is required by I.C. 8-1-2-42.

In its Response, Petitioner designates its reliance on its Petition and all parties' existing prefiled direct and future prefiled rebuttal evidence in opposition to the Motion. As with the Intervenor's more limited designated evidence, this evidence was prepared and filed for purposes of the anticipated evidentiary hearing. This evidence, along with any evidence to be elicited upon cross-examination, and any additional rebuttal testimony, presumably constitutes all of the anticipated testimonial evidence to be presented at an evidentiary hearing in this Cause.

Petitioner responds to the Motion by stating that the 1996 Gas Purchase Agreement terminated by operation of law when Petitioner acquired IPL's steam assets in 2000 and, while Petitioner committed to two industrial customers to continue the terms of the Gas Purchase Agreement until October 2003, the Gas Purchase Agreement no longer presents an impediment to implementing the proposed Service Level Agreements. Petitioner also disputes the applicability of I.C. 8-1-2-42(d) to the pricing of coke oven gas. Petitioner contends that, while its request for modification of its fuel adjustment charge relative to rates for steam service rendered to the public must meet the requirements of I.C. 8-1-2-42(d), its coke manufacturing process and resulting production of coke oven gas are not part of the steam service rendered to the public. Petitioner further contends that the proposed Service Level Agreements reflect compliance with applicable Affiliate Guidelines (approved by the Commission in Cause No. 37399 GCA 50-S1) requiring that affiliate services be procured on "competitive terms."


The Supreme Court of Indiana has said the following with respect to reviewing a motion for summary judgment:

Summary judgment is appropriate only if the designated evidentiary matter shows the absence of any genuine issue of material fact and that the movant is entitled to judgment as a matter of law. Ind.Trial Rule 56(C). A party opposing summary judgment is not required to come forward with contrary evidence until the moving party demonstrates the absence of a genuine issue of material fact. *Kennedy v. Murphy*, 659 N.E.2d 506, 508 (Ind. 1995). On appellate review, we construe the pleadings, affidavits, and designated materials in a light most favorable to the non-movant. *Heck v. Robey*, 659 N.E.2d 498, 500 (Ind. 1995). When there are material disputed facts, or if undisputed facts give rise to conflicting reasonable inferences that affect the outcome, they must be resolved in favor of the non-movant. *Mullin v. South Bend*, 639 N.E.2d 278, 281 (Ind. 1994); *Cowe v. Forum Group, Inc.*, 575 N.E.2d 630, 633 (Ind. 1991). We give careful scrutiny to assure that the losing party is not improperly prevented

from having its day in court. *Landmark Health Care Assoc. v. Bradbury*, 671 N.E.2d 113, 116 (Ind. 1996).¹

A Presiding Officer has reviewed the Motion, the Response and the Reply. The evidence designated in support of the Motion and the Response has been reviewed in light of the appropriate standard for determining a motion for summary judgment. The Presiding Officer finds that Intervenor's designated evidence does not demonstrate the absence of any genuine issue of material fact. On whole, the evidence designated by the Intervenor and Petitioner for purposes of the Motion and Response indicates the existence of material factual disputes. These issues need to be fully developed and considered in the context of an evidentiary hearing. Therefore, the Motion is denied.

IT IS SO ORDERED.



William G. Divine, Administrative Law Judge

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Date

¹ *Warner Trucking, Inc. v. Carolina Cas.*, 686 N.E.2d 102, 104 (Ind. 1997).